

# Challenging Trustee Decisions

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## Trustee Decisions

# Types of Decision:

How to apply  
capital or  
income

Who to  
select as the  
object of a  
discretionary  
trust

When to  
make  
disposition  
to the object  
of a fixed  
trust

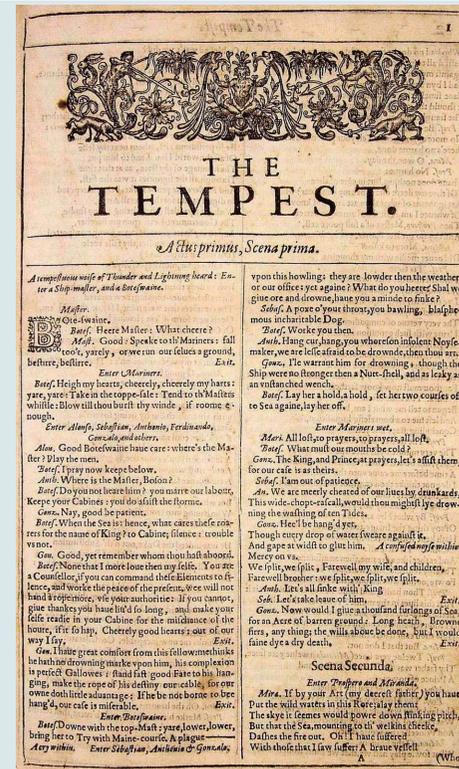
Appointment  
of alternative  
or additional  
trustees

Powers of  
investment  
or sale

Tax efficient  
decision  
making

# Trustee Decisions

*Tempest*  
v Lord  
Camoyes  
(1882)  
21 Ch. D.  
571



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Let your indulgence set me free.

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*Tempest  
v Lord  
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As you from crimes would pardoned be,  
Let your indulgence set me free.

Hell is empty  
And all the devils are here.

## Trustee Decisions

### Discretionary powers:

- *Tempest v Lord Camoys (1882) 21 Ch. D. 571*
  - “It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees,  
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- *Re Gadd (1883) 23 Ch. D. 134 CA*
  - The mere fact that the court would not have acted as the trustees have done is no ground for interference

## Trustee Decisions

### Discretionary powers:

- *Tempest v Lord Camoys (1882) 21 Ch. D. 571*
  - “It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly.”
- *Re Gadd (1883) 23 Ch. D. 134 CA*
  - The mere fact that the court would not have acted as the trustees have done is no ground for interference

## Challenging Trustee Decisions - Alternatives

### Apply to remove the trustee

- s.36, 41 Trustee Act 1925
- *Letterstedt v Broers* (1884) 9 App Cas 371

### TLATA 1996

- S.14 – may seek an order “relating to the exercise by the trustees of any of their functions...”
- Limited to trusts of land, and mainly for joint beneficial owner cases

Challenge and seek to overturn the decision itself

## Challenging The Decision

### Flaws in execution of the power

- Lack of third party / protector consent
- Breach of duty to act impartially (save where discretion to do so)
- Failure to comply with a formality required by the trust or the law
- Excessive execution
- Power exercised too late / out of time

# Challenging The Decision

## Challenges to the Decision Itself

- Failure to take into account relevant and only relevant matters
- Acted under mistake or misapprehension
- “Fraud on the power”
- Duress, undue influence or misrepresentation
- Conflict of interest
- Breach of duty of care in the exercise of investment powers

## *Pitt v Holt* [2013] UKSC 26



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- Building on *Re Hastings-Bass* [1975] Ch. 25, CA



## *Pitt v Holt* [2013] UKSC 26

### Building on *Re Hastings-Bass* [1975] Ch. 25, CA

- A trustee has a duty to have regard to relevant considerations and only relevant considerations.
- The duty extends to considering the consequences of a proposed exercise of power and not merely its nature or immediate effect.

## *Pitt v Holt* [2013] UKSC 26

### Supreme Court:

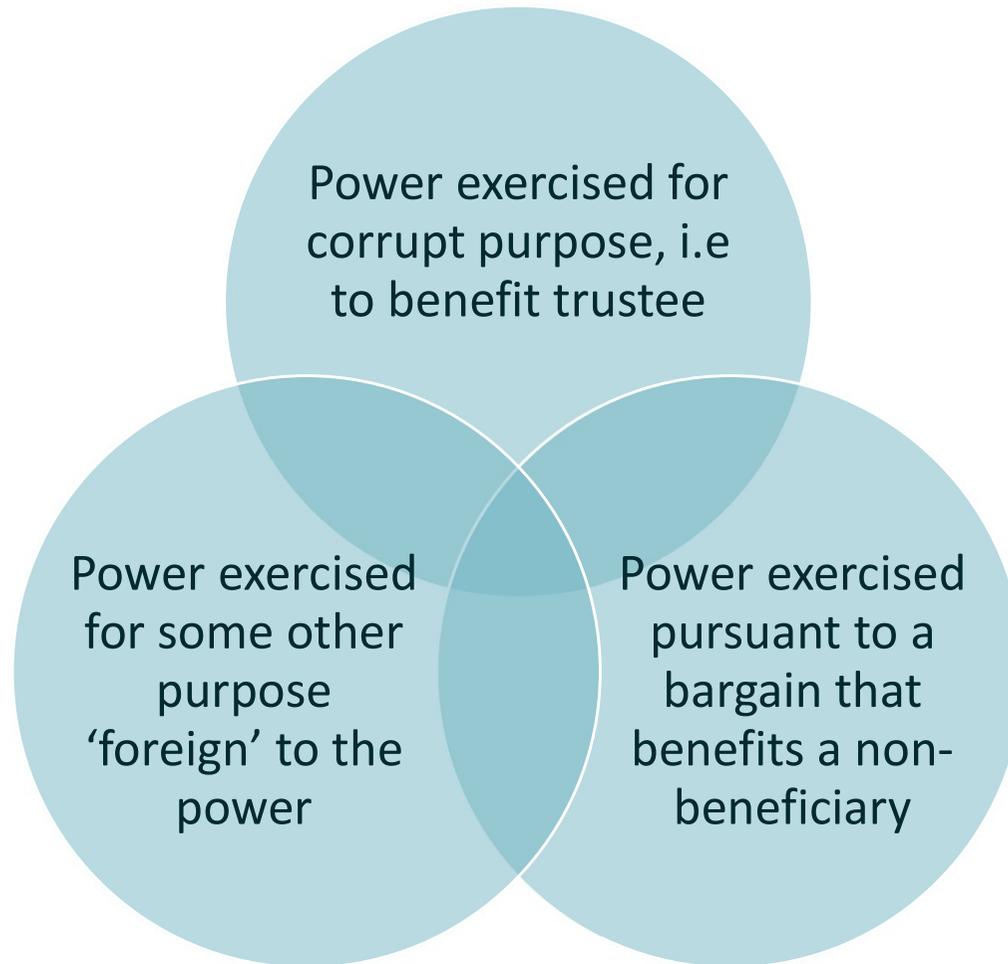
- Because the basis of the challenge is the duty to give adequate consideration to the exercise of a power, a positive mistake is not necessary (though it may be sufficient) and ignorance or absence of thought may be enough.
- When successfully challenged such an exercise of power is not void, but voidable, and relief is discretionary.
- Equitable defences may apply.
- A challenge can only be mounted where the trustee is at fault; thus where (as in *Pitt*) the trustee relied on professional (but incorrect) advice, there could be no challenge.
- Only applies to a positive exercise of power not a lack of exercise

## *Kekwick v Kekwick* [2023] W.T.L.R 579

- Per *Pitt*, a trustee who had exercised a power on the clear and unequivocal advice of a professional was not in breach of duty and so the decision could not be set aside.
- Competing duties: the duty to distribute v the duty to establish the correct object of the trust.

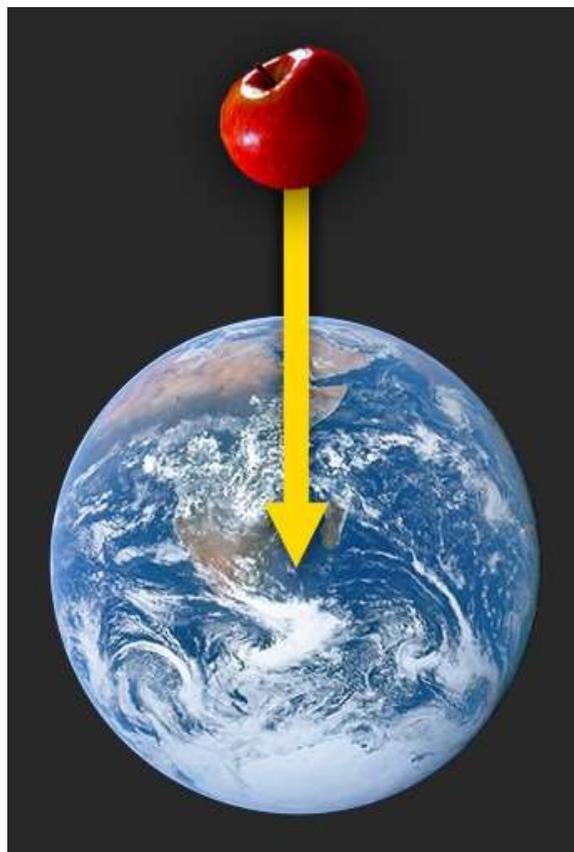


## “Fraud on a Power”



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- *Middlemas v Stevens* [1901] 1 Ch. 574

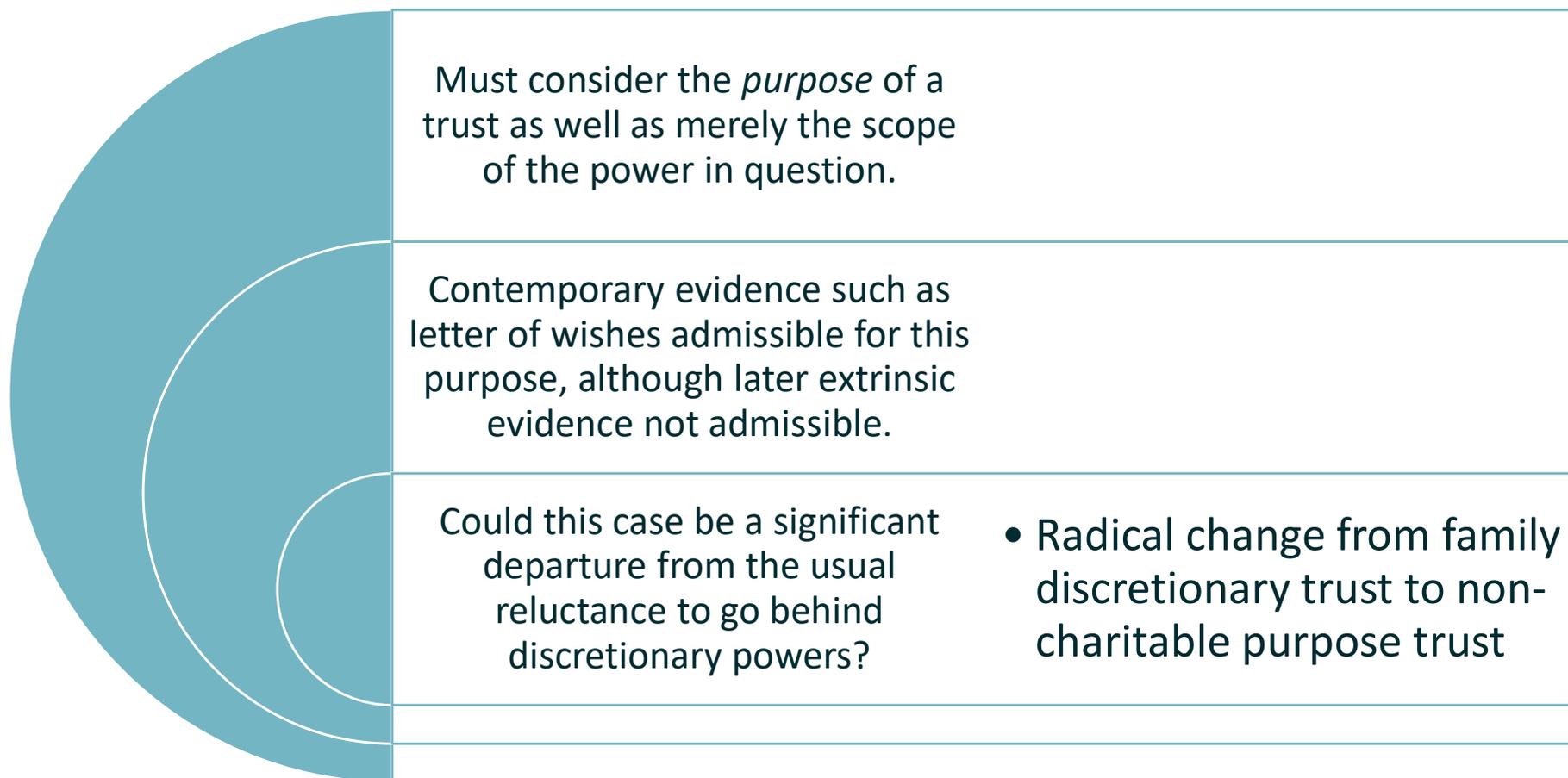


## “The Proper Purpose Rule”

- *Grand View Private Trust Co Ltd v Wen-Young Wong* [2022] UKPC 47



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## Disclosure to Beneficiaries

Entitled to knowledge of the existence of the trust and the nature of the interest:  
*Brittlebank v Goodwin* (1868) LR 5 Eq 545



Extends to discretionary beneficiaries who are 'real potential candidates' – *Re Manisty's Settlement Trusts* [1974] Ch 17



No absolute right to a copy of the trust deed itself, but in reality a court would always order disclosure

## Disclosure to Beneficiaries

- *Schmidt v Rosewood Trust Ltd (Isle of Man)* [2003] UKPC



## *Schmidt v Rosewood Trust Ltd (Isle of Man)* [2003] UKPC

A beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts.

The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from the court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion.

## *Schmidt v Rosewood Trust Ltd (Isle of Man)* [2003] UKPC

No beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interest of different beneficiaries, the trustees themselves and third parties.

Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases, the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

## Disclosure to Beneficiaries

Trust accounts  
– *Henchley v  
Thompson*  
[2017] EWHC  
225 (Ch)

Relating to  
exercise of  
powers and  
discretions

Letters of  
wishes –  
*Breakspear v  
Ackland* [2008]  
EWHC 220 (Ch)

Legal advice

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